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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 502

JOHN N. SHANNAHAN AND CLAUDE J. JACKSON, AS TRUSTEES OF THE PROPERTY OF THE CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, AND CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court of the United States for the Northern District of Indiana (R. 22–27) is reported in 20 F. Supp. 1002.

JURISDICTION

The decree of the District Court was entered on September 17, 1937 (R. 29). The petition for

appeal was filed on the same day (R. 30). The appeal was filed in this Court on October 14, 1937, and this Court noted probable jurisdiction on November 8, 1937.

Appellants base their appeal to this Court upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–220, providing that all suits to suspend or set aside an order of the Interstate Commerce Commission shall be heard by three judges, and that appeal should lie directly to this Court. Appellees deny that this suit could be brought under the Urgent Deficiencies Act, but concede that this Court has jurisdiction on appeal, not of the merits but to determine whether the lower court erred in declining to entertain the suit. *United States* v. *Corrick*, 298 U. S. 435, 440.

QUESTION PRESENTED

Is the determination of the Interstate Commerce Commission that the Chicago, South Shore and South Bend Railroad is not an interurban electric railway within the meaning of the exemption proviso in Section 1 of the Railway Labor Act an order subject to review by a three-judge court under the Urgent Deficiencies Act?

STATUTES INVOLVED

Section 1, First, of the Railway Labor Act, as amended June 21, 1934, 48 Stat. 1185, U. S. C., Title 45, Sec. 151, reads as follows:

> FIRST. The term "carrier" includes any express company, sleeping-car company,

carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

The pertinent provisions of the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–220, as they now read in U. S. C., Title 28, Secs. 41 (28), 46, and 47, read in part as follows:

SEC. 41. The district courts shall have original jurisdiction as follows:

(28) Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

* * * * *

SEC. 46. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States.

* * * * *

SEC. 47. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. * * *; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

STATEMENT

On August 9, 1934, the National Mediation Board requested the Interstate Commerce Commission to determine whether the Chicago, South Shore and

South Bend Railroad (hereinafter called the South Shore) fell within the terms of the proviso exempting certain interurban electric railways from the operation of the Railway Labor Act (R. 3, 6). On May 17, 1935, the Interstate Commerce Commission, pursuant to said request of the National Mediation Board, gave notice to the South Shore that the matter of determining the status of the South Shore under Section 1 of the Railway Labor Act had been assigned for a hearing at the Hotel Morrison, Chicago, Illinois, June 25, 1935 (R. 3, 8). At that time the South Shore appeared and offered and introduced evidence, both oral and documentary, in support of its claim that it was an interurban railway and exempt from the Railway Labor Act (*ibid.*). On August 9, 1935, the railroad filed its brief with the Commission, and the case was argued orally before the Commission on November 19, 1935 (*ibid.*). The appellants, Shannahan and Jackson, as Trustees of the South Shore, filed their written entry of appearance with the Commission on December 30, 1935 (*ibid.*).

On February 14, 1936, the Interstate Commerce Commission handed down its decision (214 I. C. C. 167). The report is printed in the record at pages 13–22. After setting forth the facts relating to the manner in which the South Shore operates its road and the reasons for the decision reached, the Commission concluded (R. 22):

> We find that the line of the Chicago South Shore and South Bend Railroad is not a

street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act.

The basic facts upon which the Commission relied in reaching the conclusion that the South Shore was not an interurban electric railway were the following:

(a) During each of the four years preceding the hearing the freight revenues of the carrier exceeded its passenger revenues (R. 18, 21, 51).

(b) The freight is carried in standard freight equipment, most of which is furnished by the steam railroads (R. 18, 21).

(c) Ninety per cent of the freight handled is interchanged with other railroads and moves in interstate commerce (R. 18, 21). The number of carloads of freight interchanged in recent years has ranged from 29,674 to 58,790 per year (R. 18).

(d) The freight carried is of a mixed character, with coal and grain furnishing the largest volume (R. 18).[1]

(e) The freight is generally hauled in freight trains consisting of forty to fifty cars and sometimes more. The carrier is a party to a large number of tariffs publishing joint rates to and from points throughout the country (R. 18).

[1] No livestock is handled, because of a deed restricting the use of six miles of the right of way (R. 18).

(f) The carrier is an intermediate carrier on a large quantity of through traffic interchanged with other roads (R. 18, 21).

(g) Even before the amendment to the Railway Labor Act in 1934, which authorized the Interstate Commerce Commission to determine whether electric railways were interurban, the Commission had held the South Shore not to be a street, interurban, or suburban electric railway (R. 20; *Rules for Testing Other Than Steam Power Locomotives*, 122 I. C. C. 414 (1925)).

On April 13, 1936, appellant filed a petition for rehearing with the Interstate Commerce Commission. This petition was denied on May 11, 1936 (R. 4, 8, 56–57).

On June 22, 1936, appellants filed in the United States District Court for the Northern District of Indiana a suit to set aside, annul, and suspend the enforcement of the Commission's "order, finding, and determination" (R. 1–6). The suit was brought against the United States, jurisdiction of the court being invoked under the Urgent Deficiencies Act. The petition alleged that Shannahan and Jackson were Trustees of the South Shore, appointed in proceedings brought under Section 77 of the Bankruptcy Act, and that the District Court had authorized them to commence the suit. The petition also alleged that the determination of the Commission was contrary to the evidence, incorrect in law, and arbitrary, and "that pursuant to said order, finding, and determination complained

of above said National Mediation Board is threatening to take, and has taken, jurisdiction of proceedings for the purpose of enforcing the provisions of said Railway Labor Act, * * *" (R. 5).

The prayer of the petition is that the Commission's "order, finding, and determination * * * be set aside, annulled, and suspended and that the enforcement of said order, finding, and determination be enjoined," and further, that the Court find and determine that the petitioners' road is an interurban electric railway not subject to the Railway Labor Act (R. 5).

The United States filed an answer in which it denied the allegations as to the illegality of the Commission's decision (R. 7–9). The United States also alleged as a separate defense that the so-called order of the Interstate Commerce Commission was not an order within the meaning of the Urgent Deficiencies Act, and that, accordingly, the statutory three-judge court was without jurisdiction to hear and determine the case. The Interstate Commerce Commission intervened as party defendant and filed a similar answer (R. 9–11).

The District Judge (Judge Slick) called Circuit Judge Evans and District Judge Baltzell to his assistance and the case was submitted to the three judges on May 18, 1937. The evidence before that court consisted of the report of the Interstate Commerce Commission (R. 13–22, 56), the testimony taken before the Commission (R. 38–56), and cer-

tain documents tending to show that the National Railway Adjustment Board was claiming jurisdiction over the carrier's relations with its employees under the Railway Labor Act (R. 57–61).

On August 16, 1937, the District Court handed down an opinion in which it found that the Commission's determination was not an order within the meaning of the Urgent Deficiencies Act and that, accordingly, the court had no jurisdiction (R. 22–24). The court did not consider the merits of the case in its opinion or in its findings of fact and conclusions of law (R. 27–28). District Judge Slick dissented on the ground that the Commission's determination was an order in substance, though not in form, in that it finally determined the status of the carrier under the Railway Labor Act (R. 25–27).

The final decree dismissing the case for want of jurisdiction was entered September 17, 1937 (R. 29). On the same day appellants filed a notice of appeal to this Court, and the appeal was allowed and has been perfected (R. 30–33).

SUMMARY OF ARGUMENT

I. The lower court properly held that it had no jurisdiction over appellants' suit to enjoin the Commission's determination that their line was not exempt from the Railway Labor Act. There was nothing in the Commission's determination which could be enforced. The determination would not result in any substantial detriment to

appellants, any injury to appellants coming from the statute and not from the determination. The Commission's determination was not a part of *its* ordinary power to regulate commerce, and accordingly is not covered by the Urgent Deficiencies Act.

II. The determination by the Interstate Commerce Commission that a particular carrier does not come within the exemption proviso for interurban railways in the Railway Labor Act is binding upon the courts unless arbitrary, capricious, or not based upon substantial evidence. The Commission's determination that the South Shore, a line deriving over 50 per cent of its revenue from freight traffic and carrying its freight in substantially the same manner as do trunk line railroads, was not an interurban, is not arbitrary, capricious, or without substantial evidence to support it.

ARGUMENT

I

THE THREE-JUDGE COURT DID NOT ERR IN HOLDING THAT IT HAD NO JURISDICTION OVER APPELLANTS' SUIT TO CORRECT AND ENJOIN THE COMMISSION'S DETERMINATION THAT THEIR LINE WAS NOT EXEMPT FROM THE REQUIREMENTS OF THE RAILWAY LABOR ACT

A. THE COURT LACKED JURISDICTION UNDER THE URGENT DEFICIENCIES ACT TO SET ASIDE THE COMMISSION'S DETERMINATION BECAUSE THERE WAS NOTHING IN THE DETERMINATION WHICH IT COULD ENFORCE

The jurisdictional scope of the three-judge district court is limited to that of its predecessor, the

Commerce Court, created by the Commerce Court Act of June 18, 1910, c. 309, 36 Stat. 539. This jurisdiction was stated in the Act to be that then possessed by the Circuit Courts of the United States over cases of four kinds, which included, first, cases for the enforcement of orders of the Interstate Commerce Commission (other than orders for the payment of money) and, second, "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

By the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, the Commerce Court was abolished and its functions were, in gross, transferred to the several district courts to be performed by a specially constituted court and under procedure specified in detail in that Act.

This jurisdiction came to the District Courts defined and limited by the decision of the Supreme Court in *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282, where the Court (pp. 293–294) pointed out the co-relation of the provisions of the statute regarding suits brought to enforce orders of the Commission and those brought to set aside such orders. It held that the Commerce Court had jurisdiction to enjoin and set aside under the second clause of such Act only such orders of the Commission as could be the subject of a suit for the enforcement thereof under the first clause. The Court said: "Thus, the first subdivision provides for the enforcement of orders; that is, the

compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission, and the second (the one with which we are concerned) dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph. In other words, by the cooperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and on the other hand, power is conferred to stay the enforcement of an illegal order." Obviously, no suit "for the enforcement" of the Commission's determination as to the South Shore railroad would lie in the Commerce Court under the first paragraph of Section 207 of the Commerce Court Act, or in a three-judge court. Hence, the lower court had no jurisdiction under the second paragraph of the Urgent Deficiencies Act. See also *Hooker* v. *Knapp*, 225 U. S. 306.

B. THE SOLE FUNCTION OF THE THREE-JUDGE COURT UNDER THE URGENT DEFICIENCIES ACT IS TO PROTECT PLAINTIFFS FROM DAMAGE OR DETRIMENT RESULTING FROM INVALID ORDERS BY THE COMMISSION. IN THE CASE AT BAR THE LOWER COURT LACKED JURISDICTION BECAUSE IT DOES NOT APPEAR THAT THE COMMISSION'S DETERMINATION WILL RESULT IN ANY SUBSTANTIAL DETRIMENT TO PLAINTIFFS

The statutory courts have no "corrective" functions. The Court in the *Proctor & Gamble* case

answers in the affirmative its question asked in its opinion (225 U. S., p. 292) whether the authority of the Commerce Court is "confined to enforcing or restraining, as the case may require, affirmative orders of the Commission." Another question asked by the Court in the opinion above referred to (p. 292) negatives the corrective jurisdiction of the statutory courts. The question as stated and answered is whether the Commerce Court may award the relief which the Commission was authorized by statute to grant but which the Commission had mistakenly refused.

Since the finding of the Commission is followed by no order against the South Shore from which it needs to be protected, the three-judge court has no jurisdiction. Appellants ask it to do what is beyond its power, to *advise* or *correct* the Commission.

In *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412 (234 Fed. 682), this Court held that a three-judge court under the Urgent Deficiencies Act did not have jurisdiction over a determination of the Commission under the Panama Canal Act of August 24, 1912, 37 Stat. 566, now Interstate Commerce Act, Section 5 (19), (20), and (21), that a plaintiff railroad was not exempt from the prohibition of the statute against operating competing water carriers. This because the Commission's so-called "order" was negative in substance, as well as in form, and, hence, not capable of being enjoined. Also because "The risk to which the rail-

road was left subject [that of prosecution for failure to divest itself of its interest in the boat lines] did not come from the order but from the above-mentioned Section of the Panama Canal Act * * *. This risk is the same that it was before the order or that it would have been if appellant had not applied to the Commission, except so far as the findings establish facts that we believe there is no desire to dispute * * *" (p. 414).

The more detailed discussion of the legal aspects of the Panama Canal Act and the orders of the Commission thereunder by the lower court in the above-cited case (see 234 Fed. 695–696) apparently approved by this Court, emphasizes the similarity of that case to the case at bar. Here the Railway Labor Act, by its terms, applies to all carries subject as the South Shore admittedly is, to the Interstate Commerce Act. The Act, however, exempts from its provisions certain kinds of electric lines and authorizes and directs the Commission to say what electric lines are of the kind which are exempted. The Commission, in its report, has said that the South Shore is not the kind of railroad exempted from provisions of the Act. In the *Lehigh* case the Commission found that that carrier was not exempt from the operation of the Canal Act (234 Fed. 695). In both instances the carrier was left exposed to the statutory requirements and the prescribed penalties in case of failure to comply with the requirements. In both cases the risk

to which the carrier is left subject does not come from the order but from the statute (243 U. S. 414).

If it be suggested that the *Lehigh* case is not authority in the case at bar because the Panama Canal Act provides specifically that "the order of the Commission shall be final," we point out that this clause merely expresses what this Court has uniformly held with respect to the Commission's findings upon questions committed to its determination by Congress. See *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 444; *Morgan* v. *United States*, 298 U. S. 468, 498; *Butte, Anaconda & Pacific Ry. Co.* v. *United States*, 290 U. S. 127.

In *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469, this Court held that the Urgent Deficiencies Act did not confer jurisdiction upon a three-judge court to set aside a finding by the Commission that the plaintiff's line was not an interurban electric exempt from a statutory prohibition against extension without authority of the Commission. Referring to the risk of prosecution under the statute or of financial loss, and citing the *Lehigh Valley* case, *supra*, the Court said (p. 476): "These risks arise, however, not from the order, but from the statute." Again the Court said (p. 477): "The penalties provided in paragraph (20) [of Section 1 of the Interstate Commerce Act] are prescribed, not for violation of an order of the Commission, but for violation of the provisions of the statute."

It should be noted that the appellants' petition (R. 1–6) makes no claim that the enforcement against it of the provisions of the Railway Labor Act (threatened, it is alleged, by the National Mediation Board) will result in any damage or detriment, irreparable or otherwise. This emphasizes the obvious fact that plaintiffs were seeking in the court below relief of a purely "corrective" character, a decision that the lines are interurban electric and within the exemption stated in the Labor Act. This is exactly what the Act specifically directs the Commission to do, and for a court to do it would be an unauthorized assumption by the court. For this reason the lower court was right in denying jurisdiction.

In *United States* v. *Atlanta, Birmingham & Coast R. Co.*, 282 U. S. 522, the Court held that the three-judge court had no jurisdiction to set aside a report of the Commission in which the Commission found that a certain item in the carrier's account should not exceed a named figure, and concluded with the statement that the carrier "would be expected" to adjust its accounts accordingly within a prescribed time. The Court points out that "No case has been found in which matter embodied in a report and not followed by a formal order has been held subject to judicial review."

In *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, the Court held that although designated an "order" by the Commission, a "final

valuation" of the property of the complaining carrier did not come within the scope of the relief provided for in the Urgent Deficiencies Act.

C. THE DUTY IMPOSED UPON THE COMMISSION TO DETERMINE WHETHER AN ELECTRIC LINE COMES WITHIN THE PROVISO OF THE RAILWAY LABOR ACT IS A SPECIAL DUTY, SEPARATE FROM AND NO PART OF THE SCHEME FOR THE REGULATION OF THE RAILROADS UNDER THE INTERSTATE COMMERCE ACT. SUITS UNDER THE URGENT DEFICIENCIES ACT WILL LIE ONLY WHEN THEY SEEK TO SET ASIDE ORDERS MADE BY THE COMMISSION IN THE PERFORMANCE OF ITS DUTIES UNDER THE ACT TO REGULATE COMMERCE

In *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, this Court held that a three-judge court lacked jurisdiction to entertain a suit to set aside a certificate issued by the Commission to the Secretary of Treasury under Section 209, Transportation Act, 1920, stating the Commission's finding of the amount required to make good the guaranty of operating income during the six months following federal control. The Court said (p. 180):

> The function imposed upon the Commission by § 209 is solely that of determining the amount required to make good the Government's guaranty. It is not an exertion of the delegated power to regulate interstate commerce. * * *
>
> Transportation Act, 1920, did not confer upon the Commission power to order anything in connection with the issue of the certificates. There is in the certificates no direction, no word of command. They are the recital of a finding of fact. * * * Be-

cause issuing certificates is not a part of the Commission's delegated power to regulate commerce and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality or correctness of its action in doing so.

All that the Court has said as to Section 209 is true of the Railway Labor Act and the Commission's single function under it—that of determining whether a given electric railway falls within the exemption proviso of the Act. Clearly this is not a phase of the *Commission's* ordinary power to regulate commerce. The Labor Act is much further dissociated from the Interstate Commerce Act than was the Transportation Act, 1920. By no stretch of reasoning can it be concluded that the Commission's determination in the case at bar comes within the scope of *its* delegated power to regulate commerce, notwithstanding the contrary assertion found on page 34 of appellants' brief. Nor do the two cases cited by appellants in any way support appellants' contention. The *Power Reverse Gear Case* (*United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454), cited by appellants, involved an order made by the Commission under the Boiler Inspection Act, which directly concerns the power used by the carriers in moving interstate commerce. Appellants' other case (*Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515) holds not that the Commission's determination under the

Railway Labor Act is an exercise by the Commission of its delegated power to regulate commerce but that the Act itself is a proper exercise by Congress of its powers under the commerce clause of the Constitution.

In conclusion upon the question of jurisdiction: Under authority of the cases cited above, the lower court correctly ruled that, as a three-judge court convened pursuant to the Urgent Deficiencies Act, its jurisdiction was strictly limited by the statute, and that the appellants' suit was not within the scope of its jurisdiction. Nothing submitted by appellants would justify a contrary result. Hence, the decision and order of the lower court should be affirmed. It is with some regret that appellees have come to this conclusion, because the direct proceeding before a three-judge court to review determinations of the Commission under the Railway Labor Act would be much more satisfactory and expeditious for the government and the Commission, as well as for the carrier concerned, than the devices for indirect collateral attack upon the Commission's findings otherwise available.[2]

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[2] In a number of cases review of the determination of the Interstate Commerce Commission that a particular electric railway did not fall within the exempting proviso of the Railway Labor Act has been sought in suits against United States attorneys to prevent enforcement of the criminal provisions of the Act. Such cases are heard before a single district judge, and appeal lies to the Circuit Court of Appeals. The cause of action is necessarily based upon proof of violation of the statute by the carrier and of threats to prose-

Notwithstanding the considerations above expressed, the conclusion seems to us inescapable that the action of the three-judge court in declining jurisdiction of appellants' suit was correct.

II

This Court Should Not Set Aside the Determination of the Interstate Commerce Commission That the South Shore Is Not an Interurban Electric Railway

Although the case was heard in the District Court both on the jurisdictional question and on the merits, the court did not pass upon the latter. If this Court should hold that the District Court erred in deciding that it had no jurisdiction, we assume that the case will be remanded to that court for a decision on the merits. *Alton R. Co.* v. *United States*, 287 U. S. 229.

Appellants have argued the merits of the case at considerable length in their brief, however, and accordingly we desire to make a brief statement of our position on the merits, in the event that this

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cute by the United States Attorney. In such cases carriers have insisted that the court must retry *de novo* the issue of whether the carrier comes within the statute, and have claimed that the court was not restricted merely to reviewing the decision of the Interstate Commerce Commission. This method of review is awkward and unsatisfactory, and if there were a choice, the appellees would much prefer to have the determinations of the Commission under Section 1 of the Railway Labor Act reviewed in the kind of proceeding here instituted.

Court should not remand the case for further proceedings. The appellees have no objection to a decision on the merits at this time.

A. THE DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION THAT THE SOUTH SHORE DOES NOT COME WITHIN THE EXEMPTION PROVISO FOR INTERURBAN RAILWAYS IS BINDING UPON THE COURTS UNLESS ARBITRARY, CAPRICIOUS, OR NOT BASED UPON SUBSTANTIAL EVIDENCE

The Railway Labor Act, as amended in 1934, differs from all prior federal regulatory statutes containing special exemptions for interurban electric railways. These earlier statutes[1] exempted such roads from the jurisdiction of the Commission; accordingly, it was necessary for the courts to determine for themselves the jurisdictional question as to whether particular carriers were interurban. It was under such statutes that *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, and *United States* v. *Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1, arose and were decided.

This form of statutory exemption for interurban electric railways raised serious administrative difficulties when applied to those railroads which in some respects resembled interurban railways and in other respects ordinary commercial roads.

[1] Interstate Commerce Act §§ 1 (22), 15a (1) (now repealed), 20a (1); Locomotive Inspection Act, § 1, 43 Stat. 659, U. S. C., Title 45, § 22; Transportation Act of 1920, § 300, 41 Stat. 469; Railway Labor Act of 1926, § 1, 44 Stat. 577.

Neither the carriers nor the Commission could have any assurance in advance of final judicial determination whether any particular line of electric railway was subject to the Act.[4] The Commission repeatedly pointed out that the statutory language was unsatisfactory, and urged that it be made more specific.[5]

Experience under the Railway Labor Act of 1926 apparently demonstrated the advisability of establishing a mechanism by which it could be determined in advance of proceedings under the statute which of these electric railways were subject to the Act and which came within the exemption. When the 1934 Amendments were under consideration by Congress, the Board of Mediation recommended that the Interstate Commerce Commission, which was more experienced in such matters than the Board itself, be authorized to

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[4] The confusion resulting from this uncertainty appears in both the *Piedmont* and *Chicago & North Shore* cases. In the former the carrier was required to begin construction of a new line of road before it could obtain a judicial determination that it did not come within the exemption and that the construction was illegal; in the latter, a decision that the carrier was subject to the Act might have invalidated millions of dollars of securities previously issued.

[5] See Annual Reports of the Interstate Commerce Commission, 35th, pp. 21, 58; 36th, pp. 30, 32, 76; 37th, p. 70; 38th, pp. 20, 78; 39th, pp. 20, 32, 72; 40th, pp. 20, 31; 41st, p. 6; 42nd, pp. 5, 79, 80, 83; 43rd, pp. 10, 89; 44th, pp. 22–23, 96; 45th, p. 122; 46th, pp. 20, 51, 73; 48th, pp. 15–16; 49th, pp. 20, 33–34, 97–98.

make such a determination.[4] Accordingly, the Act was amended so as to *authorize* and *direct* the Interstate Commerce Commission to decide which carriers were exempted by the proviso.. The advantage of having all such questions decided by a single body "informed by experience" seems obvious. *Cf. Illinois Central R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454; *United States* v. *Louisville & Nashville R. Co.,* 235 U. S. 314, 320; *Virginian Ry.* v. *United States,* 272 U. S. 658, 665.

The Railway Labor Act thus differs from the earlier statutory provisions exempting street, suburban, and interurban electric railways in that it expressly authorizes the Interstate Commerce Commission to decide what carriers come within the exemption. Accordingly, the Commission's determination under the Act is not jurisdictional and the ordinary principles determining the scope of judicial review of administrative action apply. It is, of course, established beyond question by decisions of this Court too numerous to cite that apart from jurisdictional or constitutional matters, determinations of the Interstate Commerce Commission may be set aside only when arbitrary,

[4] See Hearings before Senate Committee on Interstate Commerce, 73rd Cong., 2d Sess., S. 3266, pp. 22, 35, 158, 162; Hearings before House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., H. R. 7650, pp. 22, 84.

capricious, or not based upon substantial evidence.[7]

Appellants suggest that inasmuch as none of the facts as to the manner in which it carries on its business are in dispute, the determination as to whether those facts make it an interurban railway is one of law rather than one of fact, and therefore for the courts to decide. It is true that the determination as to whether petitioner is an interurban railway is one calling for the application of judgment to facts—but this does not make it a question of law. Most of the questions which the Interstate Commerce Commission is called upon to decide are of the same type. Properly regarded, the question of whether the South Shore is an interurban railway would seem to be one of ultimate fact or at most a mixed question of law and fact rather than one of law.[8]

The complete answer to appellants' argument was given by this Court in *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, in response to a similar contention that the courts need not accept the decision of the Interstate Commerce

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[7] e. g., *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541; *Virginia Ry.* v. *United States*, 272 U. S. 658; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297.

[8] The difficulty of deciding borderline cases does not render the question any the less one of fact. *Cf. Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479 (the meaning of "sausage").

Commission as to the meaning of "undue preference" where the facts were undisputed.

The Court there declared (235 U. S. at 320), in language equally applicable here:

> * * * the court below, in substituting its judgment as to the existence of preference for that of the Commission *on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted* an authority not conferred upon it by the statute. * * * It cannot be otherwise since, if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action. [Italics supplied.]

B. THE DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION THAT THE SOUTH SHORE WAS NOT AN INTERURBAN IS NOT ARBITRARY OR CAPRICIOUS, OR WITHOUT SUBSTANTIAL EVIDENCE TO SUPPORT IT

Inasmuch as the opinion rendered by the Interstate Commerce Commission speaks for itself, it does not seem necessary to argue at length that it is neither arbitrary nor capricious, and that it is based upon substantial evidence. The fairness and reasonableness of the opinion, the painstaking care with which the Commission analyzed and gave consideration to all of the evidence before it, and the factual bases of the decision are all manifest upon its face. Even if the scope of judicial review were not so strictly limited, we submit that the decision

of the Commission should be upheld. The decision is not only not unreasonable; the holding that a carrier which earns more than 51 per cent of its total transportation revenue from freight traffic is not an interurban railway would seem obviously correct.

The basic facts upon which the Commission relied in holding that the South Shore was not an interurban have already been set forth. See pages 6–7, *supra*. The South Shore has since 1931 derived over 50% of its revenue from freight traffic (R. 18, 51). The freight is carried in standard freight cars and is generally hauled in trains of 40 to 55 cars (R. 18). Ninety per cent of the freight carried is interchanged with the trunk line railroads, the road having connections with 7 trunk and 6 belt or switching lines. The road is an intermediate carrier on a large amount of through traffic and is a party to a large number of joint tariffs with the trunk lines (*ibid*). It competes with the lines of the New York Central system (R. 16). The road bed compares favorably with that of some of the steam roads in the vicinity, though it is not equal to that of the large trunk lines (R. 17). Although most of its passenger trains consist of one or two cars, the maximum number of coaches per train is ordinarily five or six (*ibid*).

Appellants do not challenge the findings of fact of the Commission. The substance of their argument is that if the Court disagrees with the judg-

ment of the Commission as applied to those facts, that judgment should be set aside. But as the Court has repeatedly declared, "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." (*Virginian Ry.* v. *United States,* 272 U. S. 658, 665.) "Even though, upon a consideration of all the evidence, a court might reach a different conclusion, it is not authorized to substitute its own for the administrative judgment" (*Swayne & Hoyt, Ltd.,* v. *United States,* 300 U. S. 297, 303).

Appellants contend that the *Piedmont* and *Chicago North Shore* cases, the only cases in which this Court has determined the application of the exemptions for interurban electric railways, demonstrate that the Commission's decision was wrong. Analysis of those cases points to exactly the opposite conclusion. In those cases this Court pointed out that "it is not always easy to draw the line," that "instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception." See 286 U. S. at 312; 288 U. S. at 10. The *Piedmont & Northern,* 94.5 per cent of whose revenue came from freight traffic, was "not such a case," 286 U. S. at 312. It *clearly* was not an interurban. The *Chicago North Shore* case dealt with the application of

Section 20a of the Interstate Commerce Act to a carrier 76 per cent of whose revenue was derived from passenger traffic and only 22 per cent from freight. This carrier was regarded by the Court as presenting a borderline case. The Court conceded "that the proper classification of the railway is not free from difficulty." See 288 U. S. at 13, 11. Doubt was removed in that case by prior administrative construction of Section 20a as applied to the particular carrier involved 288 U. S. at 13.

The South Shore, with over 50 per cent of its revenue derived from freight traffic, falls between the Piedmont & Northern—the easy case—and the Chicago North Shore—the borderline case. It is not so clearly a standard freight railway as the Piedmont, inasmuch as the latter carries a much larger proportion of freight traffic. On the other hand, the South Shore is clearly much less like an interurban than the Chicago North Shore, which was described by this Court as follows (288 U. S. at 10):

> The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. *The freight business is subsidiary to this primary function,* and is not fairly comparable to that ordinarily transacted by a standard steam railroad. *Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline freight business.* The main termi-

> nals serve only the passenger and merchandise freight traffic.
>
> We have thus a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. [Italics supplied.]

Inasmuch as less than half of its revenues are derived from passenger traffic, the South Shore cannot be regarded as predominately a passenger line, with its freight business "subsidiary to this primary function"—the carriage of passengers.

With the *Piedmont* presenting an easy case and the *Chicago North Shore* a close one, and the petitioner falling between and not possessing the chief characteristics which made the North Shore an interurban, it would seem under this Court's decisions that petitioner was properly classified as not being an interurban railway. Thus, even if the question were to be decided *de novo* by the courts, without giving any weight to the Interstate Commerce Commission decision, it would appear that the Commission correctly applied the principles laid down by this Court.

But as has been pointed out, in this case it is not necessary to go that far. The scope of judicial review is different under the Railway Labor Act from that under the sections of the Interstate Commerce Act involved in the *Piedmont* and *North*

Shore cases, which did not authorize the Interstate Commerce Commission to make the determination. The only question here is whether the Commission's decision was arbitrary, capricious, or unsupported by the evidence. Regardless of whether or not a court would reach the same conclusion, there can be no doubt at all that the Commission's finding satisfies this test.

It is significant in this connection that the Commission's determination follows a prior Commission decision made before the amendments to the Railway Labor Act in 1934, holding the South Shore not to be an interurban railway. See *Rules for Testing Other than Steam Power Locomotives*, 122 I. C. C. 414. Both of the Commission's decisions relating to the South Shore are in accord with a number of other Commission rulings that interurban railways are lines primarily devoted to the transportation of passengers, and that roads not falling within this description are not interurban.[9] It must be assumed that Congress was aware of these decisions when, in the Railway Labor

[9] See *In the Matter of the Application of the Western Pacific Railroad Company for Authority to Acquire Control of the Sacramento Northern Railway and to Purchase the Bonds of the Sacramento Northern Railroad*, 71 I. C. C. 653; *Proposed Control of Sacramento Northern by W. P. R. R.*, 79 I. C. C. 782; *Application of Section 15A of the Interstate Commerce Act to Electric Railways*, 86 I. C. C. 751, 753; *Proposed Construction of Lines by Piedmont & Northern Ry. Co.*, 138 I. C. C. 363, 368, 372; *Railway Mail Pay: In the Matter of the Application of the Illinois Terminal Company*, 174 I. C. C. 796, 799.

Act amendments, it selected the Commission to determine which electric lines were interurban, and that in the absence of other directions, Congress intended the Commission to follow the standards previously adopted.

Appellants argue at length that under Indiana statutes and decisions the South Shore is treated as an interurban railway. But as this Court declared in *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304, a carrier's status under federal statutes "does not depend upon whether a charter declares it to be a common carrier, nor upon whether the State of incorporation considers it such; but upon what it does."

CONCLUSION

It is respectfully submitted that the judgment of the district court should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 502.—October Term, 1937.

John N. Shannahan, et al., Trustees, Appellants, *vs.* United States of America, et al.	Appeal from the District Court of the United States for the Northern District of Indiana.

[April 4, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

The sole question for decision is whether the District Court had jurisdiction of this controversy under the Urgent Deficiencies Act of October 22, 1913.[1]

The Chicago South Shore and South Bend Railroad is an interstate electric railway subject to the Interstate Commerce Act. On August 9, 1934, the National Mediation Board requested the Commission to determine whether that carrier fell within the exemption from the scope of the Railway Labor Act, as amended June 21, 1934, 48 Stat. 1185, c. 691 (45 U. S. C. § 151). That Act confers upon the National Mediation Board certain duties in respect to carriers by railroad subject to the Interstate Commerce Act, with the following exception:

"*Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

After due hearing had, at which the South Shore introduced evidence and filed its brief, the matter was argued orally before the Commission, which, on February 14, 1936, made its Report and the following determination (214 I. C. C. 167, 173):

[1] c. 32, 38 Stat. 208, 219, 220, 28 U. S. C. §§ 41(28), 46, 47.

"We find that the line of the Chicago, South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of Section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act."

No order was entered thereon by the Commission.

Shannahan and Jackson, who had been appointed Trustees of the South Shore by the federal court for northern Indiana, and had filed their appearance in the proceeding, applied for a rehearing. An order was entered denying the same. Thereupon, the Trustees filed this suit against the United States, invoking the jurisdiction of the court under the Urgent Deficiencies Act of October 22, 1913, to set aside the alleged order. They do not deny that the South Shore is an interstate carrier subject to the jurisdiction of the Commission; and that the Act is constitutional. Their contention is that:

"A correct application of the law to the undisputed facts leads to the conclusion that the lines of the railroad of appellants are an electric interurban railway under the exemption proviso of the first division of Section 1 of the Railway Labor Act and that there is no substantial evidence to support the conclusion and determination of the Commission."

The Commission intervened. Its answer, and that of the United States, challenged the jurisdiction of the court on the ground that the determination of the Commission was not an "order" within the meaning of the Urgent Deficiencies Act. The case was heard before three judges on the pleadings and evidence; and a decree was entered dismissing the bill for want of jurisdiction, one judge dissenting. 20 F. Supp. 1002. The Trustees appealed.

First. The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It "had no characteristic of an order, affirmative or negative". *United States* v. *Illinois Cent. Ry.*, 244 U. S. 82, 89; *United States* v. *Atlanta, B. & C. Ry.*, 282 U. S. 522, 527-28. Compare *Lehigh Valley R. R.* v. *United States*, 243 U. S. 412, 414. But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. "It was merely preparation for possible action in some proceeding which may be instituted in the future". *United States* v. *Los Angeles & S. L. R. R.*, 273 U. S. 299, 310. The determination is thus not enforceable by the Commission; the only action which could ever be taken

on it would be by some other body. It is as clearly "negative" as orders by which the Commission refuses to take requested action. *United States* v. *Griffin*, 302 U. S. —.[2] As such, it is not reviewable under the Urgent Deficiencies Act.

Second. Moreover, the determination of the Commission is not even a decision which the Mediation Board, by whom it was sought, is empowered to enforce. The Act confers upon the Board no power over any carrier. It merely imposes upon the Board possible duties in respect to interstate carriers by railroad not exempted by the proviso. The Board's duties, in case of dispute between carrier and employees, require it:

(1) to "promptly put itself in communication with the parties to [the] controversy, and . . . use its best efforts, by mediation, to bring them to agreement". When a dispute is settled through these efforts a mediation agreement is signed, and should any question arise subsequently regarding the meaning or application of such an agreement, the Board is required upon request of either party "and after a hearing of both sides [to] give its interpretation within thirty days."

(2) If the mediating efforts prove unsuccessful, it is the Board's duty to "at once endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration, in accordance with the provisions of" the Act. If arbitration is agreed upon it may become the Board's duty to name a third arbitrator if the two named by the parties fail to select him.

(3) If arbitration is refused and the dispute threatens "substantially to interrupt commerce to a degree such as to deprive any section of the country of essential transportation service", then the Board is required to notify the President.

(4) If, in selecting representatives to deal with the carriers, disputes arise among employees as to what organization they desire to represent them, it is the duty of the Board, on request of either party, to investigate and to certify in writing to the parties and to the carrier the names of the individuals or organizations that have been designated and authorized to represent the employees.

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[2] See also Procter & Gamble Co. v. United States, 225 U. S. 282; Hooker v. Knapp, 225 U. S. 302; Lehigh Valley R. R. v. United States, 243 U. S. 412, 414; Manufacturers Ry. v. United States, 246 U. S. 457, 482-83; Atchison, T. & S. F. Ry. v. United States, 279 U. S. 768, 781; Piedmont & No. Ry. v. United States, 280 U. S. 469, 475-77; Standard Oil Co. v. United States, 283 U. S. 235, 238; United States v. Corrick, 298 U. S. 435, 438.

(5) If the National Railroad Adjustment Board undertakes arbitration, and it fails to select a referee, the Mediation Board has the duty of doing so.

In order not to fail in the performance of these duties the Mediation Board had to satisfy itself whether the South Shore was a railroad within the exemption proviso. To that end, it applied to the Commission for its determination. If it had omitted to do so, the application might have been made "upon complaint of any party interested." The determination, whether applied for by the Board, by a carrier, or by employees, is clearly not an order enforceable within the meaning of the cases construing and applying the Urgent Deficiencies Act. It is a decision on a controverted matter, comparable to that considered in *United States* v. *Los Angeles & Salt Lake R. R. Co,* 273 U. S. 299, in *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, in *United States* v. *Atlanta B. & C. Ry.,* 282 U. S. 522, and in *United States* v. *Griffin,* 302 U. S. —, which were held not to be subject to review under the Urgent Deficiencies Act.

Third. The Trustees argue that the determination of the Commission is an affirmative "order, because it fixed for the first time, by the only body authorized by law to do so, the status of the carrier"; that by fixing the status, the obligations of the Railway Labor Act are fixed upon the carrier; and that wilful failure or refusal of any carrier to comply with certain of the obligations is made a misdemeanor.[3]

Lehigh Valley R. R. Co. v. *United States, supra,* shows that the determination of a status or similar matter is not action subject to review under the Urgent Deficiencies Act even if disregard of the determination may subject the carrier to criminal prosecution.[4] The Panama Canal Act prohibited, after July 1, 1914, any ownership

[3] 45 U. S. C. § 152(10). That declares: "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh or eighth paragraph of this section shall be a misdemeanor. . . . ." The third paragraph prohibits interference, influence or coercion in the designation of representatives. The fourth assures the right of employees to bargain collectively through representatives of their own choosing, and forbids carriers to maintain or financially assist any labor organization. The fifth prohibits carriers from requiring any person seeking employment to sign any contract to join or not to join a labor union. The seventh prohibits carriers from changing rates of pay, rules or working conditions of employees as a class except as prescribed in Section 156. The eighth requires carriers to notify its employees by printed notices in such form as shall be specified by the Mediation Board that all disputes will be handled in accordance with the requirements of the Act.

[4] For details, see opinion of the District Court for Eastern Pennsylvania, 234 Fed. 682.

by a railroad in any common carrier by water where the railroad might compete with the water carrier; prescribed a heavy penalty for any violation of the prohibition; and conferred upon the Commission jurisdiction:

"to determine the questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation . . . of this section and pray for an order permitting the continuance of any vessel or vessels already in operation. . . . ".

Thereupon in January, 1914, the Lehigh Valley filed with the Commission a petition for a hearing on the question whether the services of a steamboat line owned by it would be in violation of the above section and for an extension of time. The Commission held that, by virtue of the arrangements found to exist, the railroad did or might compete with its boat line; and dismissed the petition. This Court held that the risk to which the railroad was left subject did not come from the order, but from the statute which contained the prohibition and provided a penalty; that, therefore, it was not an affirmative order; and that the District Court was without jurisdiction under the Urgent Deficiencies Act. Compare also *Piedmont & No. Ry.* v. *United States,* 280 U. S. 469, 476-77.

Fourth. Whether the determination of the Commission is reviewable in a district court by some judicial procedure other than that of the Urgent Deficiencies Act we have no occasion to consider. Compare *United States* v. *Griffin, supra,* and *Lehigh Valley Ry. Co.* v. *United States, supra.*[5]

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

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[5] In Utah-Idaho Cent. Ry. *v.* Shields (unreported), D. Utah, Oct. 15, 1936, and in Hudson & Manhattan Ry. *v.* Hardy (unreported), S. D. N. Y., Feb. 21, 1938 (where jurisdiction under the Urgent Deficiencies Act was specifically denied), the electric railways involved were declared in proceedings before single judges to be within the proviso excluding them from the application of the Act, and final injunctions against prosecution for penalties were granted, although the Interstate Commerce Commission, in 214 I. C. C. 707 and 216 I. C. C. 745, respectively, had reached the opposite conclusion. In Texas Electric Ry. *v.* Eastus (unreported), N. D. Tex., June 4, 1936, a preliminary injunction was likewise granted in spite of the Commission's decision in 208 I. C. C. 193. From informal sources it has been learned that similar proceedings have been instituted in other cases. Chicago Warehouse & Term. Co. *v.* Igoe, N. D. Ill., and Chicago Tunnel Co. *v.* Igoe, N. D. Ill., to review 214 I. C. C. 81; Hudson & Manhattan Ry. *v.* Quinn, D. N. J., to review 216 I. C. C. 745; New York, W. & B. R. R. *v.* Hardy, S. D. N. Y., to review 218 I. C. C. 253.